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In the Supreme Court

OF THE

United States

October Term, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FT. WAYNE - SOUTH BEND, INC., et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY, AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE[1]

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students. Today it includes over 1500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and resources to enable the Christian Legal Society to act where the rights of Christians to exercise and express their faith are being improperly infringed. The Center's resources include, for example, prominent constitutional attorneys, computerized legal research and an awareness of national trends. In pursuit of

[1]The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 42(2) of the Rules of this Court.

its goals, The Center has held several regional conferences providing continuing legal education by experts in fields such as constitutional law, federal practice and procedure, non-profit organizations, state and federal taxation, recent case developments, etc. The Center's national membership and professional resources thus enable it to focus public attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized.

The National Labor Relations Board in this case has asserted jurisdiction over several Roman Catholic secondary schools. The resolution of this suit will have an important impact not only upon these schools but also upon Roman Catholic elementary and secondary schools throughout the nation.[2] This action, then, involves vital issues of religious freedom affecting employee discipline and curriculum nationwide.

This brief is filed to provide the court with the views of *amicus* on legal aspects of this case which to date have not been adequately addressed by the parties.

SUMMARY OF ARGUMENT

Amicus urges that this court find that the National Labor Relations Board's (NLRB) action has burdened the free exercise of Respondents' religion. *Amicus* then suggests that governmental regulation in this highly sensitive constitutional area cannot be justified as a response to any grave abuse or paramount governmental interest. Congress has spoken several times on the issue. It first decided that the Wagner Act would not extend to any public elementary or secondary educational institution when it exempted governmental bodies, in particular, school boards, from the scope of section 2(2) of the Act. Accordingly, almost three million public school teachers today are specifically excluded from the coverage of the

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[2]Appeals challenging the constitutionality of the National Labor Relations Act as applied to religious schools are *sub judice* in the Third, Seventh and Ninth Circuits. *Caulfield v. Hirsch*, 3rd Cir. Nos. 77-2021 and 77-1972; *Gordon Technical High School, Directed by the Congregation of the Resurrection v. National Labor Relations Board*, 7th Cir., No. 77-1583; *Cardinal Timothy Manning v. National Relations Board*, 9th Cir., No. 77-1286.

Act. While this vast number of teachers is ignored, the regulation of 100,000 remaining teachers in Catholic elementary and secondary schools cannot be said to represent a grave threat to national labor policy. Moreover, Congress specifically found no compelling interest to regulate in the religious educational area when it enacted Title VII of the Civil Rights Act of 1964. That statute, as amended in 1972, evidences Congress' recognition that strong national policies are not sufficient to circumscribe the First Amendment freedoms of religious schools.

In addition, the government, in arguing that it can accommodate any legitimate religious questions which arise during its regulatory activities, has misread the rule of benevolent or accommodating neutrality found in this Court's cases. Benevolent or accommodating neutrality is a principle which shields free exercise of religious belief from governmental intrusion. To argue that accommodation permits the NLRB to regulate these religious schools constricts the free exercise of religion. This result is directly contrary to the policy of this Court encouraging the flourishing of religious belief and exercise.

ARGUMENT

I. THE NLRB CANNOT PROVE A COMPELLING STATE INTEREST BECAUSE CONGRESS HAS REPEATEDLY DECLARED THAT THERE IS NO GRAVE NEED TO REGULATE PUBLIC OR RELIGIOUS ELEMENTARY OR SECONDARY SCHOOLS.

Amicus suggests that the record below amply demonstrates that the Circuit Court was correct when it found that the NLRB's actions have implicated a religious liberty interest protected by the First Amendment. See Cert. Pet. App. A at 27a-30a. A District Court facing the same question in *Caulfield v. Hirsch*, F. Supp. , 95 LRRM 3164 (E.D. Pa. 1977), petition for cert. pending No. 77-1411 (1978), arrived at the identical, inevitable conclusion that the assertion of jurisdiction by the NLRB denies religious liberty. On a complete trial record, the *Caulfield* court found that the NLRB's action would impermissibly affect: (a) teacher discipline, (b) curriculum, and (c) the free exercise of the Catholic Church's belief in a single

undivided community of faith. *Caulfield v. Hirsch, supra,* at 3176-77.

Proceeding from the finding that a religious liberty interest is implicated herein, for this governmental action to stand, the balancing test provided in *Sherbert v. Verner,* 374 U.S. 398 (1963), must be applied. The state regulation must be justified by a " 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' ". *Id.* at 403. More specifically,

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." *Id.* at 406. *Accord, Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972).

The NLRB's attempt at justification fails in this case. The governmental interest was plainly insufficient in the leading cases of *Yoder, supra; Ohio v. Whisner,* 41 Ohio St. 2d 181 (1976); and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Although these are not labor cases they are illustrative of the government's heavy burden of justification in the free exercise area.

On the particular facts of this case the NLRB's rationale is similarly deficient. Congress itself determined that the Wagner Act (61 Stat. 136, 29 U.S.C. §151 *et seq.*), was not needed to prevent industrial strife in public elementary and secondary institutions. In section 2(2) of the Act the term "employer" specifically excluded "any State or political subdivision thereof". 29 U.S.C. §152(2). This Court can take judicial notice of the fact that the great bulk of educational services in this nation is provided at the local level by just these public instrumentalities which Congress excluded from coverage by the Act.[3] If the need of the NLRB to assert jurisdiction over the Catholic schools is so compelling, then why did not Congress attempt to reach as

[3]The United States Census Bureau reports that in 1976 there were 2,974,000 full and part-time instructional personnel in this country's public elementary and secondary schools. Bureau of the Census, *Public Employment in 1976,* GE-76, No. 1, Table 3, p. 9.

many educational institutions as it could when it defined the scope of the Act? The reason is clear. Congress did not identify and act upon any such compelling interest in the public school area for there is none. The Act was designed to ameliorate the strife occurring in industry. No similar need was found to exist in the educational arena.[4]

Similarly, no such compelling interest to regulate was found in the religious educational area when Congress enacted Title VII of the Civil Rights Act of 1964. As originally enacted section 702 of that Act provided that —

> "This Title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." 78 Stat. 255.

As amended by the Equal Employment Opportunity Act of 1972, section 702 of Title VII still reads —

> "This Title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such

[4]Moreover, even today, whatever proposals there are to extend federal authority into the educational area specifically exclude religious institutions. See H.R. 1978, the "National Public Employee Relations Act" introduced in the 95th Congress, 1st Session. Section 2(2) of the Act defines an employer as

> ". . . any State or any political subdivision thereof, including, without limitation, any town, city, county, burrough, district, school board, board of regents, social service or welfare agency, public and quasi-public corporation, housing authority or other authority or public agency established by law, and any person or persons designated by the employer to act in its interest in dealing with employees".

The Act does not extend to religious educational institutions. BNA, 1 Govt. Employee Relations Rpt., Reference File, §51-181.

> corporation, association, educational institution, or society of its activities." 42 U.S.C. §2000e-1.

It is extremely noteworthy that the only change in section 702 wrought by the 1972 amendments was to remove the exemption from coverage by the Act of the educational institutions *except* those which are religiously affiliated. Religious educational institutions were left alone. In enacting the 1964 Act Congress was responding to the compelling national interest in the elimination of discrimination. However Congress specifically excluded religious educational bodies from the full coverage of the Act. The total elimination of discrimination was not a compelling enough interest to cause Congress to intervene in the affairs of these religious schools. .

The above Congressional decisions certainly indicate that the NLRB's assertion of jurisdiction is faulty. There are some 100,000 lay teachers in the Catholic schools of America.[5] This is about 3% of the total number of teachers in this country. Because the remaining 2,974,000 teachers are exempted from the Wagner Act their condition is neither grave nor of paramount concern. See *Sherbert v. Verner, supra,* at 406. Without stronger evidence of a compelling state interest,[6] this Court should not carve out this small religious segment of the greater whole for governmental regulation.

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[5]The figure cited is from *The Official Catholic Directory,* General summary, pp. 1-2 (1977).

[6]The *Caulfield* court found that —

> "The application of the Act to Catholic parish elementary schools simply does not conjure up an impression of grave abuses endangering paramount federal interests, or for that matter, the lesser abuses and dangers sought to be alleviated by the Act." *Caulfield, supra,* at 3178.

II. THE NLRB IN ATTEMPTING TO INVOKE A RULE OF REASONABLE ACCOMMODATION WITH RESPECT TO THE CHURCH AND ITS EMPLOYEE RELATIONS IGNORES THE PRIOR DECISIONS OF THIS COURT. MOREOVER, ITS ACTIONS WOULD EXCESSIVELY ENTANGLE GOVERNMENT WITH RELIGION IN VIOLATION OF THE FIRST AMENDMENT.

Without any citation to authority, the NLRB, during oral argument before the Circuit Court, contended that when genuine religious questions arose during its regulatory activities, it would "try to make some reasonable accommodation to the religious purpose of the school". Cert. Pet. App. A at 40a. The Board in other words has attempted to use the concept of "accommodation" as a sword to allow it to enter the previously forbidden area of religious education. The government in this respect has misapplied the concept of "accommodation" as it has developed in First Amendment religion clause cases. Accommodation is not a sword permitting governmental interference. It is instead a shield which has defended free exercise claims from arguments that the recognition of the claim constitutes an impermissible establishment of religion.

Accommodation is the doctrine whereby this Court has protected legitimate free exercise claims from establishment clause challenges. Whenever the two clauses conflict, free exercise claims must supercede establishment clause considerations. *Wisconsin v. Yoder, supra,* at 234 n.22, spoke to this issue when the Court rejected a contention that protecting the religious exercise of the Amish would somehow establish religion in a constitutional sense. Whenever such a conflict arises free exercise values must be preserved. Accord P. Kurland, "The Supreme Court, Compulsory Education, And The First Amendment's Religion Clauses." 75 *W. Va. L. Rev.* 213, 244 (1973).[7] Nevertheless, when the two religion clauses overlap, a zone of intersection is created. This Court's recognition that free exercise values must be paramount in

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[7]Professor L. Tribe notes that this conclusion drawn from *Yoder* is in agreement with the intent of the framers of the Constitution. L. Tribe, *American Constitutional Law,* Section 14-3, at 819 (1978).

such cases has been characterized by Professor L. Tribe of Harvard as the identification of "the zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests." L. Tribe, *American Constitutional Law*, Section 14-4 at 823 (1978). In his words, this is the "zone of permissible accommodation" of establishment clause concerns to free exercise values.

To trace the actual case development of accommodation requires a clear understanding of the meaning of the word. The term "accommodation" inherently denotes the concept of "favor", "obliging" or amiableness toward a designated object, such as the free exercise of religion. See *Black's Law Dictionary*, 4th Edition Revised, at 32 (1968); *The Oxford English Dictionary*, Volume 1, at 59 (1933). The principle of accommodating neutrality found in this Court's cases is well stated by former Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306 (1952). The Court in that case sustained a released time program which had been challenged under the Establishment Clause. Said the Court —

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." *Id.* at 313-14. (emphasis supplied)

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), tax exemptions for churches were upheld over an Establishment Clause attack. Concerning the true role of accommodation the Court noted —

> "... The general principal deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. (emphasis supplied)

Benevolent neutrality or amiableness, not hostility or regulation, should be the attitude towards free exercise claims. Perhaps the accommodation shield is best illustrated in *Wisconsin v. Yoder, supra*, at 234 n.22. In upholding the religious beliefs involved therein this Court ruled that the recognition of an exemption for the Amish from the state's compulsory education system did not constitute an impermissible establishment of religion.

> "... *Accommodating* the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory education law would impose. Such an *accommodation* 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall'. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)." *Id.* (emphasis supplied)

The NLRB's accommodation argument turns the accommodation rule on its head. Instead of permitting these religious schools to flourish unimpeded by governmental action because of the benevolent or accommodating neutrality principle, the government has taken the first step toward regulating these institutions. Instead of favoring or obliging these religious schools in their religious mission the government seeks to strike at the core of their being: curriculum and teacher discipline. Benevolent or accommodating neutrality towards free exercise does not justify such a result.

To permit the government's argument to succeed not

only stands accommodation on its head but results in an excessive entanglement with church affairs. See *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971). The Circuit Court recognized this when it broke the government's accommodation sword.

> "A 'reasonable accommodation' by the Board 'to the religious purposes of the school' on the presentation of a doctrinal issue in an unfair labor practice case would implicitly appear to us to involve the necessity of explanation and analysis, and probably verification and justification, of the doctrinal precept involved, all of which would itself erode the protective wall afforded by the constitutional right." Cert. Pet. App. A. at 43a.

That sword should not be repaired by this Court. The government's accommodation argument should be rejected.

CONCLUSION

For the reasons stated above, *amicus* respectfully urges this Court to affirm the judgment of the Seventh Circuit below. Congress has clearly indicated that national policies will not be frustrated if these schools are left unregulated. Moreover, *amicus* suggests that this Court should declare in the strongest terms that benevolent or accommodating neutrality creates a zone for the protection of free exercise, not its regulation.

Respectfully submitted,

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STATE OF DELAWARE }
NEW CASTLE COUNTY } ss.

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of New Castle, State of Delaware, over the age of eighteen years and not a party to the within action or proceeding.

My business address is 1102 West Street, Wilmington, Delaware 19801. On , 1978, I served the within BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office in the City of Wilmington, Delaware, addressed to the parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on , 1978, at Wilmington, Delaware.

_____
Marcia Pawlina

SWORN TO AND SUBSCRIBED before me on the day and year aforesaid.

_____
Notary Public